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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SYDNEY RAMMEL, Plaintiff and Respondent, v. DENNIS BURNHAM, Defendant and Appellant.	D053071 (Super. Ct. No. GIC873899)

APPEAL from a judgment and order of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

Sydney Rammel sued her former boyfriend Dennis Burnham (Burnham) for breach of an oral contract, alleging he had failed to fully repay a loan. In October 2006 a process server served a copy of the summons and of the complaint at Burnham's home on a person identified in the proof of service as "Mrs. Burnham" and then mailed a copy of the summons and of the complaint to Burnham's home address, as required by Code of Civil Procedure[1] section 415.20 to effectuate substitute service of process. A default

1 All further statutory references are to the Code of Civil Procedure.

judgment was entered against him. In January 2008—15 months after the substitute service of process, 10 months after he received by mail Rammel's request for entry of default, and three months after he received by mail a copy of the abstract of the default judgment—Burnham unsuccessfully moved to set aside the default judgment.

Burnham appeals the judgment and the order denying his motion, contending the court abused its discretion (1) because he adequately demonstrated lack of service of the summons and complaint from which the entry of the default judgment arose, and (2) by holding that Burnham was not diligent in bringing his motion and by sua sponte finding prejudice to Rammel. We conclude the court did not abuse its discretion and affirm the order and judgment.

BACKGROUND

A. *Complaint*

In late 2006 Rammel filed her complaint against Burnham for his failure to repay her the sum of $40,000 he allegedly owed her under an oral contract.

B. *October 2006 Substitute Service of Process*

James Titus, a registered process server, filed a proof of service in which he stated under oath that on October 20, 2006, he served Burnham with copies of the summons and complaint (and other papers) by leaving the copies at Burnham's residence[2] with, or in the presence of, "Mrs. Burnham," whom Titus described as being "CAU, F, 40S, 5-6,

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2 Burnham does not dispute that the address given by Titus in the proof of service and Titus's declaration of due diligence (discussed, *post*) is his home address.

160#, spouse." Titus also stated in the proof of service that on that same day he mailed copies of the summons and complaint to Burnham's residence.

In his declaration of due diligence, Titus indicated he had unsuccessfully attempted to personally serve Burnham with process four times at his home between October 15 and October 19 of 2006. Titus also indicated in his declaration that he effectuated "[s]ubstituted [s]ervice" on Burnham by leaving copies of the summons, complaint and other documents with "Mrs. Burnham," whom he again described as being "CAU, F, 40S, 5-6, 160#," at Burnham's residence, and by mailing copies of those documents to Burnham at that address.

C. *February 2007 Default and Notice of Rammel's Request for Entry of Default*

The record shows, and Burnham acknowledges, that he was notified of Rammel's action against him when he received by mail on February 23, 2007, a copy of Rammel's request for entry of default, which her counsel mailed to him on February 22. Rammel's request stated that on October 13, 2006, she had filed a "complaint or cross-complaint" against Burnham in the Superior Court of San Diego County under case No. GIC873899 and that she was requesting the entry of Burnham's default.

The court clerk entered Burnham's default on February 23, 2007, the day Burnham acknowledges he received the copy of Rammel's request for entry of default.

D. *August 2007 Default Judgment*

On August 31, 2007, the court entered a default judgment against Burnham in this matter in the amount of $44,366.95.

E. *October 2007 Notice of the Default Judgment*

On October 22, 2007, according to his own declaration, Burnham received by mail notice of a lien against his house and a document indicating a default judgment had been entered against him.[3] That same day, Burnham viewed and copied the court file in this matter.

F. *Burnham's Retention of Counsel*

On December 27, 2007, Burnham contacted Anna Romanskaya, an attorney at Stark & D'Ambrosio, LLP, to discuss their representing him in this matter.

On January 3, 2008, Burnham retained Stark & D'Ambrosio to represent him in this case.

G. *Burnham's January 2008 Motion and Supporting Declaration*

On January 25, 2008,[4] Burnham sought leave to defend the action by filing a motion to set aside the default judgment. Stating he was "not seeking to contest the default," Burnham argued the default judgment should be set aside under section 473.5, subdivision (a) (hereafter section 473.5(a)) based on lack of actual service and the claimed timeliness of his motion; and under section 473, subdivision (b) (hereafter section 473(b)) on the grounds of mistake, inadvertence, surprise and excusable mistake, and the claimed timeliness of his motion.

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3 We presume Burnham was referring in his declaration, at page 2, lines 10 through 12, to the abstract of judgment, which was recorded on October 22, 2007.

4 All further dates are to calendar year 2008 unless otherwise specified.

In support of his motion, Burnham filed his own declaration, executed on January 17, in which he stated, "I am currently not married and I do not have anyone residing with me that fits" the description of the person who, according to Titus's proof service, was served with copies of the summons and complaint. Burnham also stated that he never received the mailed copies of the summons and complaint and that he believed they may have been delivered to the wrong address "due to the fact that there is no visible address label on my property and my mailbox is comprised of a basket which rests on the bench in front of the front door to my house." Attached to the declaration was a copy of a photograph showing the bench and basket in front of the front door.

H. *Rammel's Opposition*

In her opposition to Burnham's motion, Rammel argued that the court in its discretion should deny the motion on the ground the "six month limitations period" under sections 473(b) and 473.5(a) had "long since passed," and Burnham indicated in his moving papers that he was not even attempting to set aside the default.

I. *Burnham's Reply*

In his reply brief, Burnham argued that (1) his February 2007 receipt of Rammel's request for entry of default did not put him on actual notice of the summons and complaint or of a specific lawsuit against him; (2) the statutory six-month period under sections 473(b) and 473.5(a) did not start to run until October 22, 2007, when he was put on actual notice of the action; (3) even if he was not entitled to relief under sections 473(b) and 473.5(a), he was entitled to equitable relief on the ground of extrinsic fraud or

mistake, because service of process was accepted by an unauthorized person; and (4) Rammel failed to demonstrate prejudice from his alleged delay in bringing his motion.

In support of the reply, Burnham's attorney, Romanskaya, filed her own declaration, stating that Burnham contacted her office on December 27, 2007, and retained her firm on or about January 3.

J. *Court's Ruling*

The court issued a tentative ruling denying Burnham's motion. The court found the motion was untimely under both section 473(b) and section 473.5(a). The court stated it lacked jurisdiction to grant relief under section 473(b) because the motion was filed more than six months after entry of default, and setting aside the default judgment alone under that section "would be a futile act if the default remain[ed]."

The court also found that Burnham did not file his motion within a "reasonable time" as required under section 473.5(a). The court reasoned that although Burnham's February 2007 receipt of a copy of Rammel's request for entry of default might not constitute actual notice in time to defend the action, it was relevant to the issue of whether Burnham sought relief within a reasonable time because it put him on notice that a "complaint or cross-complaint [was] filed . . . on 10/13/2006 . . . by . . . Sydney Rammel" against him. The court also stated that Burnham had not adequately explained his failure to seek relief after he received the request for entry of default; Burnham's declaration did not address the three-month delay between October 22, 2007, when he received notice of the lien and default judgment, and January 25, 2008, when he filed his motion; and the reply declaration of Burnham's counsel did not explain the two-month

delay from October 22 to December 27, 2007, when Burnham contacted defense counsel's office.

Noting that Burnham claimed for the first time in his reply that the default judgment was obtained by extrinsic fraud or mistake and that Burnham seemed to suggest he did not need to show diligence in seeking equitable relief because Rammel had not suffered prejudice, the court reiterated that Burnham had not shown diligence in seeking relief from the default and default judgment. Citing *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 (*Rappleyea*), the court found that Rammel had made an adequate showing of prejudice because reversal of the default judgment following the granting of equitable relief from default would have divested her of a property right.

On March 21, 2008, after hearing oral argument, the court confirmed its tentative ruling for the reasons stated therein. Burnham's appeal followed.

DISCUSSION

Burnham contends that in denying his motion to set aside the default judgment and for leave to defend the action, the court abused its discretion (1) because he adequately demonstrated lack of either personal or substitute service of the summons and complaint from which the entry of the default judgment arose, and (2) by holding that Burnham was not diligent in bringing his motion and sua sponte finding prejudice to Rammel. These contentions are unavailing.

A. *Applicable Legal Principles*

1. *Substitute service of process*

"[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation.] Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444.)

"Section 415.20, subdivisions (a) and (b) authorize substitute service of process in lieu of personal delivery." (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) "Statutes governing substitute service shall be 'liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant . . . . [Citation]' [Citation.]" (*Ibid.*)

Here, substitute service of the summons and complaint on Burnham at his residence was governed by section 415.20, subdivision (b) (hereafter section 415.20(b)), which provides in part:

> "If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served . . . a summons may be served by leaving a copy of the summons and of the complaint at the person's dwelling house . . . in the presence of a *competent member of the household* . . . at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint . . . to the person to be served at the place where a copy of the summons and complaint were left." (Italics added.)

2. *Relief from entry of default or default judgment*

In *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495 (*Cruz*), this court recently explained that "[a]lthough a trial court has discretion to vacate the entry of a

default or subsequent judgment, this discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner, within any applicable time limits." (See also generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 5:276 et seq., p. 5-67 et seq. (rev. # 1, 2008) [describing various grounds, procedures and time limits applicable to seeking relief from default].) "The proper procedure and time limits vary, depending on the asserted ground for relief." (*Cruz, supra,* 146 Cal.App.4th at p. 495.)

Here, Burnham's moving papers indicated he sought to set aside the default judgment under sections 473 and 473.5. His motion reply papers also indicated, for the first time, that he sought equitable relief from the default judgment based on extrinsic fraud or mistake. Accordingly, we review the pertinent legal principles governing motions for relief under sections 473(b), 473, subdivision (d) (hereafter section 473(d)), and 473.5(a), as well as motions for equitable relief based on extrinsic fraud or mistake.

a. *Section 473*(*b*)

Relief under section 473 from the entry of a default or default judgment may be based on either (1) evidence showing the entry resulted from "mistake, inadvertence, surprise, or excusable neglect," in which case relief is *discretionary*; or (2) an "attorney's affidavit of fault" attesting to the fact that the entry resulted from the attorney's "mistake, inadvertence, surprise, or neglect," in which case relief is *mandatory*. (§ 473(b); see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 5:290, p. 5-70

(rev. # 1, 2008).) Specifically, the granting of discretionary relief is authorized by section 473(b), which provides in part:

> "The court *may*, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her *mistake, inadvertence, surprise, or excusable neglect*." (Italics added.)

The granting of mandatory relief based upon an "attorney's affidavit of fault" is also authorized by section 473(b), which provides in part:

> " Notwithstanding any other requirements of this section, the court *shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an *attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect*, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Italics added.)

The outside time limit for seeking relief under section 473 is six months. (§ 473(b) ["Application for this relief . . . shall be made within a reasonable time, *in no case exceeding six months*, after the judgment, dismissal, order, or proceeding was taken" (italics added)]; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 5:365, p. 5-95 (rev. # 1, 2006).) This six-month time limit is "jurisdictional and relief cannot be granted under section 473 if the application for such relief is instituted more than six months after the entry of the judgment, order or proceeding from which relief is sought." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 735, fn. 3; see also *Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 805 [six-month

limit is a limitation upon the power of the court to grant any relief under section 473] & Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 5:365, p. 5-95 (rev. # 1, 2006).) The hearing and ruling on a timely motion for relief under section 473, however, may take place after the expiration of the six-month jurisdictional period. (*Northridge Financial Corp. v. Hamblin* (1975) 48 Cal.App.3d 819, 826; see also Weil & Brown, *supra*, ¶ 5:369, p. 5-96 (rev. # 1, 2006).)

Apart from the outside, jurisdictional six-month time limit, however, separate time limitations apply to the filing of a motion for relief under section 473 depending on whether the moving party is seeking discretionary or mandatory relief, because (as we shall explain) the six-month period starts to run from a different judicial event depending on the type of relief sought. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶¶ 5:278-5:279.1, pp. 5-67 & 5-68 (rev. # 1, 2008).)

i. *Discretionary relief*

A party who seeks discretionary relief under section 473(b) from the entry of *both* a default and a default judgment based on mistake, inadvertence, surprise, or excusable neglect, must bring the motion for relief "within a reasonable time," but "in no case exceeding six months" after the clerk's entry of the *default*. (§ 473(b); *Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970 (*Rutan*); *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 901; *Northridge Financial Corp. v. Hamblin*, *supra*, 48 Cal.App.3d at p. 825.) When such relief is sought, the limitation period runs from the date of the clerk's entry of default, and not from the date of entry of the default judgment, because "vacation of the judgment alone ordinarily would constitute an idle act; if the judgment were

vacated the default would remain intact and permit immediate entry of another judgment giving the plaintiff the relief to which his complaint entitles him." (*Rutan, supra,* 173 Cal.App.3d at p. 970; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra,* ¶ 5:366, p. 5-95 (rev. # 1, 2006).)

However, entry of a default and entry of a default judgment are separate procedures, and a default judgment may be set aside without disturbing the underlying default. (See *Rutan, supra,* 173 Cal.App.3d at p. 970.) Thus, a party who seeks discretionary relief under section 473(b) from only the entry of a default judgment (leaving the preceding entry of default in effect) based on mistake, inadvertence, surprise, or excusable neglect must bring the motion for relief "within a reasonable time," but "in no case exceeding six months" after the date of entry of the default *judgment*. (§ 473(b); *Rutan, supra,* 173 Cal.App.3d at p. 970.)

ii. *Mandatory relief*

A party who seeks mandatory relief under section 473(b) based on an attorney's affidavit of fault must bring the motion for relief "no more than six months after entry of *judgment*." (§ 473(b), italics added; *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 296-297.)[5]

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5 We need not further address this issue as the instant case does not involve a motion for mandatory relief under section 473(b) based on an attorney's affidavit of fault.

iii. *Public policy considerations*

The California Supreme Court has explained that "'when relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted.' [Citations.]" (*Rappleyea, supra,* 8 Cal.4th at pp. 981-982.)

b. *Section 473.5*(*a*)

After the outside six-month period specified in section 473(b) has expired, a party may seek relief under section 473.5(a) from a default or default judgment by showing lack of "actual notice . . . in time to defend the action."[6] A defendant may move for relief under section 473.5 "if the court has acquired jurisdiction, i. e., summons has been served, but service of summons has not resulted in actual notice." (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 40.)

A motion for relief under section 473.5(a) must be filed and served "within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered." (§ 473.5(a).)

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6 Section 473.5(a) provides in part: "When service of a summons has not resulted in *actual notice* to a party *in time to defend the action* and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action." (Italics added.)

Subdivision (c) of section 473.5 provides that if the court finds the motion was made in a timely manner within the period permitted by subdivision (a), and the moving defendant's lack of actual notice in time to defend the action was "not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action."

c. *Section 473*(*d*)

"Under section 473, subdivision (d) [(hereafter section 473(d))], the court may set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service." (*Ellard v. Conway, supra,* 94 Cal.App.4th at p. 544; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 209, pp. 814-815.) A motion for relief under section 473(d) must be made within the statutory period set forth in section 473.5(a), i.e., within a reasonable time not to exceed the earlier of two years after entry of a default judgment or 180 days after service of a notice of entry of that judgment. (8 Witkin, Cal. Procedure, *supra,* Attack on Judgment in Trial Court, § 209, p. 815.)

d. *Equitable relief*

"After six months from entry of default, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable." (*Rappleyea, supra,* 8 Cal.4th at p. 981.) One ground for equitable relief is "extrinsic mistake," a term that refers to circumstances outside of the litigation that have prevented a party from obtaining a hearing on the merits. (*Ibid*.; *Cruz, supra,* 146 Cal.App.4th at p. 502.) In *Cruz,* we explained that "[e]xtrinsic mistake exists when the ground for relief is not so much the

fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense." (*Cruz, supra*, 146 Cal.App.4th at p. 503.) We further explained that "[r]elief on the ground of extrinsic fraud or mistake is not available to a party if that party has been given notice of an action yet fails to appear, without having been prevented from participating in the action." (*Ibid.*)

To set aside a default judgment based upon extrinsic fraud or mistake, a party must satisfy three elements: (1) "the defaulted party must demonstrate it has a meritorious case;" (2) "the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action;" and (3) "the moving party must demonstrate diligence in seeking to set aside the default once . . . discovered." (*Rappleyea, supra,* 8 Cal.4th at p. 982; *Cruz, supra*, 146 Cal.App.4th at p. 503.)

"When a default judgment has been obtained, equitable relief may be given only in exceptional circumstances." (*Rappleyea, supra*, 8 Cal.4th at p. 981, italics omitted.)

e. *Standards of review*

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "The burden of demonstrating error rests on the appellant." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

A motion to set aside a default or default judgment is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of discretion the trial court's order granting the motion will not be disturbed on appeal. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854; *Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 619-620.) "We review a challenge to a trial court's order denying a motion to vacate a default on equitable grounds as we would a decision under section 473: for an abuse of discretion." (*Rappleyea, supra,* 8 Cal.4th at p. 981.)

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

B. *Analysis*

We conclude the court did not abuse its discretion in denying Burnham's motion for relief from the default judgment for reasons we now explain.

1. *Claim of lack of service of process*

Burnham first contends the court abused its discretion in denying his motion for relief under section 473.5(a) because he adequately demonstrated lack of service of the summons and complaint from which the entry of the default judgment arose. Specifically, Burnham asserts he is seeking relief based on lack of actual notice of the summons and complaint because he was not properly served by either personal service or substitute service; and he states "[t]he only evidence of service is substituted service upon a person who represented herself as Mrs. Burnham, allegedly [his] wife," and the only

description of this person given by the process server was "CAU, F, 40S, 5-6, 160#, spouse." Burnham maintains he "adequately demonstrated through his declaration that he *is currently and at the time of service was* an unmarried man and *does not have* anyone residing with him that fits this description." (Italics added.) Burnham's contentions are unavailing.

A careful examination of Burnham's declaration in support of his motion reveals that he failed to demonstrate therein that a person fitting the foregoing description did *not* reside with him on October 20, 2006, when, according to the sworn statements of the process server (Titus) in his proof of service and declaration of due diligence, he (Titus) left copies of the summons and complaint with that person at Burnham's residence. In his declaration, which he submitted in late January 2008, Burnham stated:

> "The Proof of Service stated that copies of the Summons and Complaint were left at my home on October 20, 2006 with someone who represented herself as Mrs. Burnham. The person was described as 'CAU, F, 40S, 5-6, 160#, spouse.' However, *I am currently not married and I do not have anyone residing with me that fits that description.* My only female relative with the last name Burnham is my sister, who resides in Atlanta, Georgia and she was not visiting me at the stated time of service. Similarly, my only daughter currently resides in San Luis Obispo, California and was not visiting me at the stated time of service either." (Italics added.)

Burnham's statement in January 2008 that "I am currently not married and I do not have anyone residing with me that fits that description" does not show he was unmarried at the time of substitute service of process at his home in October 2006, nor does it show that the person whom Titus described as Burnham's spouse, and as a female Caucasian in

her 40's, five feet six inches in height, and weighing 160 pounds, did not receive the copies of the summons and complaint from Titus at that time.

As the moving party seeking relief under section 473.5(a) based on his claimed lack of actual notice of the summons and complaint in time to defend the action, Burnham thus failed to present evidence showing that Titus failed to leave a copy of the summons and of the complaint at his dwelling house "in the presence of a competent member of the household . . . at least 18 years of age," as required by section 415.20(b) (discussed, *ante*). Burnham's assertion that "he presented uncontradicted evidence that the person served who was identified as 'Mrs. Burnham' did not exist" is unpersuasive. We conclude that because Burnham failed to meet his burden of showing the substitute service of process at his home was defective or ineffective, the court did not abuse its discretion to the extent it rejected Burnham's claim for relief under section 473.5(a) based on his alleged lack of actual notice in time to defend the action. Burnham's related claim that the default judgment should be set aside under section 473(d) (discussed, *ante*) due to improper service of process fails for the same foregoing reasons.

2. *Diligence and prejudice*

Burnham next contends the court abused its discretion by holding that he was not diligent in bringing his motion, and by sua sponte finding prejudice to Rammel. Specifically, Burnham complains that because he "adequately demonstrated" the lack of service of the summons and complaint from which the entry of the default judgment arose, it was "entirely unreasonable" for the court to state that he did not address (1) the three-month delay between October 22, 2007, when he first received notice of the default

judgment, and January 25, when he brought his motion for relief from that judgment; and (2) the two-month delay from October 22, 2007, to December 27 of that year, when he first contacted the law firm of Stark & D'Ambrosio. He maintains that "[i]n the face of [Rammel's] lack of prejudice, [he] demonstrated sufficient diligence" to set aside the default judgment. These contentions are unavailing.

For reasons discussed *ante*, we have concluded that Burnham failed to meet his burden of showing the substitute service of process at his home was defective or ineffective.

We also conclude the court did not abuse its discretion in finding that Burnham failed to bring his motion for relief under section 473.5(a) in a timely manner. As already discussed, Burnham was required to bring his motion "within a reasonable time." (§ 473.5(a).) Burnham, however, failed to show that he diligently brought his motion within a reasonable time. On February 23, 2007, about 11 months before he filed his motion, Burnham received by mail a copy of Rammel's request for entry of default, which notified Burnham that (1) she had filed a "complaint or cross-complaint" against him on October 13, 2006, in the San Diego County Superior Court, under case No. GIC 873899; and (2) she was requesting the entry of Burnham's default. It is undisputed that Burnham took no action to investigate the matter before the court entered the default judgment against him six months later in late August 2007. Burnham acknowledges that on October 22, 2007, about two months after the entry of the default judgment, he received actual notice by mail that a default judgment had been entered against him. However, he waited another two months before contacting counsel on December 27 of

that year, and he did not file his motion until January 25, one month later. In his declaration in support of his motion, Burnham did not adequately explain these delays. The foregoing record establishes that Burnham did not bring his motion for relief "within a reasonable time" as required by section 473.5(a).

Burnham's related claim that he demonstrated sufficient diligence because Rammel suffered no actual prejudice attributable to the delay between his discovery of either the default or the default judgment and the filing of his motion to set aside the default judgment is unavailing. The Supreme Court has recognized that reversal of a default judgment is prejudicial to the plaintiff in that it divests her of a property right. (*Rappleyea, supra,* 8 Cal.4th at p. 984.) Furthermore, as the *Rappleyea* court explained, the California Supreme Court has explained that, when relief under section 473 is no longer available, strong public policy favors the finality of judgments and only in exceptional circumstances should relief be granted. (*Rappleyea, supra,* 8 Cal.4th at pp. 981-982.) As we shall explain, Burnham's claim for relief under section 473 was time-barred at the time he filed his motion. Accordingly, the strong public policy favoring the finality of judgments applied in this case.

3. *Claim for relief under section 473*(*b*)

The court did not abuse its discretion in finding that Burnham's motion for relief under section 473(b) was also untimely. As already discussed, that section requires that the motion be made "within a reasonable time, in no case exceeding six months, after the judgment . . . was taken." (§ 473(b).) Although Burnham stated in the memorandum of points and authorities supporting his motion that he was "not seeking to contest the

default," he in fact did contest the entry of the default because he repeatedly requested, both in his motion papers and during oral argument, leave to defend Rammel's action against him. As this court explained in *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385, "[t]he entry of a default terminates a defendant's rights to take any further affirmative steps in the litigation until either its default is set aside or a default judgment is entered." Thus, the court could not grant Burnham's request for leave to defend the action unless it set aside the default.

Because Burnham's motion for relief under section 473(b) thus necessarily requested the setting aside of the default entered against him, the six-month jurisdictional limitation period for the bringing of the motion began to run on February 23, 2007, the date on which the court clerk entered Burnham's default. (§ 473(b); *Rutan, supra,* 173 Cal.App.3d at p. 970.) Because Burnham did not file his motion for relief under section 473 until late January 2008, about 11 months later, the court lacked jurisdiction to grant that relief. (See *Aldrich v. San Fernando valley Lumber Co., supra,* 170 Cal.App.3d at p. 735, fn. 3.)

4. *Claim for equitable relief*

In his motion reply papers, Burnham claimed for the first time that, even if he was not entitled to relief under sections 473(b) and 473.5(a), he was entitled to equitable relief on the ground of extrinsic fraud or mistake because service of process was accepted by an unauthorized person. The court rejected that claim.

Although Burnham does not explicitly contend on appeal that the court erred by rejecting his claim for equitable relief, he raises as a ground for appeal his claim that he

presented in his declaration "uncontradicted evidence that the person served who was identified as 'Mrs. Burnham' did not exist." In his appellant's reply brief, he appears to indirectly challenge the court's denial of his equitable relief claim by asserting the court "went so far as to rely upon its own independent research when it held that it would be 'divesting a plaintiff of a property right by granting *equitable relief from default*' and failed to take consideration of any options other than denying relief into account." (Italics added.)

We conclude the court did not err in denying Burnham's claim for equitable relief. As discussed *ante*, when (as occurred here) a default judgment has been entered, equitable relief may be given only in exceptional circumstances. (*Rappleyea, supra*, 8 Cal.4th at p. 981.) The requisite exceptional circumstances for the granting of such relief do not exist in this case. For reasons discussed, *ante*, we have concluded that Burnham's assertion that he presented uncontradicted evidence establishing that the person whom Titus served with process and identified as Mrs. Burnham did not exist, is unpersuasive. In addition, Burnham has failed to meet his burden of showing entitlement to equitable relief because he has not shown, and cannot demonstrate, diligence in seeking to set aside the default once discovered. (See *id.* at p. 982; *Cruz, supra*, 146 Cal.App.4th at p. 503.)

DISPOSITION

The judgment and order are affirmed. Rammel shall recover her costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.